

No. 11819

**United States Circuit Court of Appeals
For the Ninth Circuit**

MOORE DRY DOCK COMPANY and FIREMAN'S FUND INDEMNITY COMPANY, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees Compensation, Federal Security Agency and LUELLA G. CAMPBELL, also known as LUELLA G. KELLY, alleged widow of WILLIAM ANGUS CAMPBELL, Deceased.

Appellees.

**OPENING BRIEF OF APPELLANTS
MOORE DRY DOCK COMPANY AND
FIREMAN'S FUND INDEMNITY COMPANY**

FILED

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OPENING BRIEF OF APPELLANTS
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JURISDICTION

An application for benefits under the Longshore-
men's and Harbor Workers' Compensation Act
(United States Title 33, sections 900-950) was filed
by the appellee Luella G. Campbell, also known

as Luella G. Kelly on the ground that she was entitled to a widow's death benefit by reason of the death of William Angus Campbell. (R4) The latter was drowned on May 12, 1945, while in the course of his employment at Oakland, California, for the Moore Dry Dock Company. (R4) The Moore Dry Dock Company, as employer, and the Fireman's Fund Indemnity Company, as legal insurer of said employer for workmen's compensation benefits payable under the Longshoremen's and Harbor Workers' Compensation Act, were named as defendants by said claimant. (R4)

After a hearing in the matter before Deputy Commissioner Warren H. Pillsbury, (R4) and the taking of a deposition at Nanaimo, British Columbia, where the claimant resides, an award of a death benefit in favor of the claimant was made by the deputy commissioner on December 3, 1946. (R 25-28) Within thirty days thereafter, (as required by United States Code Title 33, section 921(a), the appellants herein on December 31, 1946, filed their Complaint for Injunction (R 2-7) in the District Court of the United States, Northern District of California, Southern Division, which is the federal district court for the judicial district in which the injury occurred (as required by United States Code Title 33, section 921(b)).

The federal district court, through Judge Harris, granted an interlocutory injunction on March 11, 1947, (R 9) The same court on June 25, 1947, confirmed the award of the deputy commissioner. (R 11) Petition for Allowance of Ap-

peal (R 22) was filed by your appellants and Order Allowing Appeal was issued by the federal district court, through Judge Harris, on September 24, 1947. (R 21)

Jurisdiction of this court upon appeal is invoked under section 128(a) of the United States Judicial Code (28 U.S. Code 225).

STATEMENT OF THE CASE

William Angus Campbell was on the 12th day of May, 1945, in the employ of the Moore Dry Dock Company at Oakland, California, as a stage rigger, and was engaged in ship repair operations on a completed vessel in navigable waters of the United States. (R 4) On said date, Campbell sustained injury arising out of and in the course of his employment, resulting in immediate death, when he fell from the vessel to the water and was drowned. (R 4)

On the date of fatal injury, the Fireman's Fund Indemnity Company, under and by virtue of a contract with the Moore Dry Dock Company, insured said Moore Dry Dock Company against the liability imposed upon it by the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. Code, sections 900-950). (R 4)

Within a year after the date of Campbell's death, Luella G. Campbell, also known as Luella G. Kelly, filed her claim with the appellee Warren H. Pillsbury, as deputy commissioner, against the appellants herein, for the purpose of recovering a widow's death benefit under the Longshoremen's

and Harbor Workers' Compensation Act. (R 4) Thereafter, the matter came on regularly for hearing before said deputy commissioner, the issues were joined, and evidence, both oral and documentary, was received and the matter submitted for decision. (R 4)

Thereafter, on the 3rd day of December, 1946, said Warren H. Pillsbury, deputy commissioner and appellee herein, filed in his office and served upon the parties to said proceedings a Compensation Order—Award of Death Benefit which is appended to this brief. (R 5, R 25-28)

On December 31, 1946, your appellants filed in the United States District Court, as hereinbefore set forth, a Complaint for Injunction seeking to have set aside the Compensation Order—Award of Death Benefit issued by the Deputy Commissioner on the grounds that same was not in accord with law in finding that the claimant and appellee, Luella G. Campbell, also known as Luella G. Kelly, was a legal dependent upon the deceased employee, William Angus Campbell, on May 12, 1945, and entitled to a death benefit at the rate of \$13.13 a week commencing with May 13, 1945, and continuing thereafter until the further order of the Deputy Commissioner. (R 2-7)

The salient facts of the case are as follows: The claimant, Luella G. Campbell, also known as Luella G. Kelly, was married to the deceased employee, William Angus Campbell, in British Columbia on February 8, 1922. (R 26) He left her on or about September 4, 1923 and came to the United

States. (R26) During the ensuing five months he wrote her on several occasions, but thereafter to the time of his death on May 12, 1945, did not communicate with her. Neither did he contribute after his departure to her support or to the support of their two children. (R 26-27)

The claimant, with some aid from the public authorities of British Columbia, supported herself and children during the fifteen years between 1923 and 1938. In the latter year without seeking or obtaining a divorce from Campbell, she married William James Kelly. (R 27) The ceremony was performed in British Columbia on May 14, 1938. (R 27) From that date to the present she has lived with and been supported by Kelly. (R 6)

The question presented by the above facts is as follows: Did the Deputy Commissioner commit an error of law in the granting to the claimant of a death benefit under the Longshoremen's and Harbor Workers' Compensation Act? This point was raised by the appellants' Complaint for Injunction. (R 5-6)

SPECIFICATION OF ERROR

I.

That the United States District Court for the Northern District of California, Southern Division, erred in making and entering the order and decree dated June 25, 1947, denying your appellants' application for a mandatory injunction to restrain compensation order of the appellee, Deputy Commissioner Warren H. Pillsbury, filed by him as here-

inbefore set forth, on December 3, 1946; and in failing to vacate the award in favor of the appellee Luella G. Campbell, also known as Luella G. Kelly, which order and award, it is respectfully contended, are not in accordance with law. (R 18-19)

ARGUMENT OF THE CASE

The Facts Are Undisputed, But an Erroneous Application of the Law Has Been Made Thereto

A copy of the "Compensation Order—Award of Death Benefit" of the deputy commissioner is appended hereto for convenient reference. The pertinent portion thereof for the purpose of this case is as follows:

"That the claimant herein, Luella G. Campbell, also known as Luella G. Kelly, was born December 26th, 1903, and was married to the employee, William Angus Campbell, on February 8th, 1922. The said employee left claimant on or about September 4th, 1923. During the following period of five months he wrote her on several occasions and thereafter did not communicate with her to the time of his death. He did not after his departure contribute to her support or to the support of their two children; that such conduct constituted desertion of claimant by the said William Angus Campbell. In good faith and believing her husband, William Angus Campbell, to be dead, claimant married one William James Kelly on May 14th, 1933. At said time the said William Angus Campbell was still living. No divorce was ever had between claimant and William Angus

Campbell, that therefore claimant was still the wife of William Angus Campbell at the time of his death on May 12th, 1945, and that the said William Angus Campbell was still deserting her at said time. The claimant is entitled to a death benefit at the rate of \$13.13 a week commencing with May 13th, 1945, and payable at said rate in installments each two weeks or monthly at her election until the further order of the Deputy Commissioner * * * "

The order of the deputy commissioner sets forth the facts of the case (which, as previously stated, are undisputed) and certain legal conclusions. Separately stated, these may be summarized as follows:

(1) THE FACTS—that Campbell left his wife in 1923 and did not thereafter see her or support her prior to his death in 1945; that she married Kelly in 1938 (through inadvertence this date is shown by the deputy commissioner as 1933), and thereafter lived with and was supported by Kelly.

(2) THE CONCLUSIONS OF LAW—that Campbell's conduct constituted desertion of claimant; that claimant was still the wife of Campbell at the time of his death in 1945 and that he was still deserting her at that time; that claimant is entitled to a death benefit under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

We have no quarrel with the facts as found by the deputy commissioner's decision. We do contend that the legal conclusions drawn do not warrant the award of a death benefit under the law.

It is elementary, of course, that the findings of *fact* of the deputy commissioner, when supported by substantial evidence, are to be regarded as final and conclusive and not subject to judicial review. *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251; *Crowell v. Benson*, 285 U.S. 22. Likewise, logical deductions and inferences which may be drawn from the evidence by the deputy commissioner are to be regarded as final and not judicially reviewable. *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244; *Contractors, Pacific Naval Air Bases v. Pillsbury*, 150 Fed. 2d 310.

Recognizing these fundamental principles, we submit that this is not a case to which they have application. The *facts* of the instant case are not in controversy and are fairly set forth in the findings of the deputy commissioner. We refer, of course, to the findings of *fact* and *not* to the *conclusions of law* drawn from those undisputed facts.

We submit that there is no statute or rule of law which deprives the federal courts of the power to review the conclusions of law of a deputy commissioner. We respectfully submit that the federal courts have not only the power *but also the duty* to review and reverse errors of law committed by a deputy commissioner. Particularly is this true where the facts themselves are undisputed, and it is only the application thereto of the statutory provisions which is in controversy. We think the foregoing proposition is self-evident and too well established to require citation of authority (but see *Norton v. Warner Co.*, 321 U.S. 565, 568).

THE STATUTORY PROVISIONS

The statutory provisions of the Longshoremen's and Harbor Workers' Compensation Act which are pertinent to the dependency claim in this case are the following:

"Sec. 9. If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) * * *

(b) If there be a surviving wife or dependent husband and no child of the deceased, to such wife or dependent husband 35 per centum of the average wages of the deceased during widowhood, or dependent widowerhood, with two years compensation in one sum upon remarriage; * * *

(f) All questions of dependency shall be determined at the time of the injury.

"Sec. 2(16). The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time."

From these provisions, it is at once apparent that the question of dependency must be determined on the basis of the situation which existed at the time of the fatal injury; namely May 12, 1945. It is also apparent that the claimant must, to qualify for recovery, bring herself within the provisions of Sec. 2(16) quoted above.

An analysis of that subdivision of the statute will indicate that not every surviving wife can qualify as a dependent. Congress and the framers of the Act obviously had in mind a definite limitation of surviving wives eligible to receive benefits to those with certain qualifications, excluding others. So there was placed in the subdivision the requirement that the term "widow" shall include *only* a surviving wife who is able to fulfill certain other requirements. *In addition to being the wife, she must also at the time of the husband's death have been*

- (a) Living with him, or
- (b) Dependent upon him for support, or
- (c) Living apart from him for justifiable cause, or
- (d) Living apart from him by reason of his desertion.

If an otherwise eligible surviving wife cannot show these additional qualifications, she does not become a "widow" within the meaning of Sec. 2(16) of the Act and therefore is not entitled to compensation. It is the contention of your appellants that the surviving wife in this case is unable to show any of these additional qualifications, as required by the statute, and that she is a member of the class of surviving wives which the framers of the Act, and Congress, intended for exclusion.

WHY IS THE CLAIMANT NOT QUALIFIED FOR BENEFITS?

Let us analyze the facts of the present case in the light of the statutory provisions, as set forth above. Mrs. Kelly was undoubtedly the wife of the decedent as a result of their marriage in 1922. Since there was no divorce, it follows that she may legally be deemed his surviving wife at the time of his death, as found by the deputy commissioner. But the possession of this status is only the first step toward eligibility for a death benefit under the Act.

We have seen heretofore that under Sec. 2(16) of the Act a "widow" is something more than the surviving wife of the decedent. She must possess one of a listed group of additional qualifications. Let us examine the admitted facts of this case to see whether the wife of the decedent qualified as a "widow" within the meaning of the Act.

(a) **LIVING WITH DECEDENT**—The first alternative which will render a wife a "widow" within the meaning of the law is that she was living with her husband at the time of his death. This possibility may be quickly dismissed in the instant case, for it is obvious from the record, and conceded by the claimant, that she did not live with her first husband at the time of his death nor for 22 years theretofore.

(b) **DEPENDENT FOR SUPPORT**—The second alternative may also be disposed of without difficulty. The claimant not only was not dependent upon the decedent for support when he died, but had received no support from him for over twenty years.

On the contrary, during the seven years preceding the death of her first husband, she had been supported by her second husband, William James Kelly, with whom she still lives and by whom she is still supported. The obvious purpose of this provision of the law is to protect those wives who *are* supported by their husbands, but for one reason or another do not share the same abode.

(c) LIVING APART FOR JUSTIFIABLE CAUSE—There is no evidence in the instant case that the claimant was “living apart” from her first husband “for justifiable cause.” This provision of the law protects a wife who has been forced by the husband’s misconduct to leave his bed and board, and who therefore is not living with him or being supported by him. The provision obviously was not applicable to the facts of this case, and the findings of the deputy commissioner ascribe the separation of the couple to other causes; to wit, desertion by the decedent husband.

(d) LIVING APART BY REASON OF DESERTION—The record and findings of the deputy commissioner make it plain that alternatives (a) residence with the husband at time of death, (b) dependence upon husband for support at time of death, and (c) living apart from husband at time of death for justifiable cause are without application to this case. On the other hand, the nature of the facts and the findings of the deputy commissioner make it apparent that alternative (d) “living apart” from the husband at the time of his death “by reason of his desertion” is the basis of the decision and award.

The findings say “ * * * that such conduct constituted desertion of the claimant by the said William Angus Campbell * * * and that the said William Angus Campbell was still deserting her at said time * * * ” (referring to the time of his death).

Since this is the fourth and last alternative, the right of the claimant to benefits must stand or fall on her ability to show that at the time of her first husband's death, she was “living apart * * * by reason of his desertion.” We will demonstrate, both on the basis of logic and precedent, that the claimant has *not* brought herself within the meaning of this provision of the law.

An examination of the statute [Sec. 2(16)] discloses the fact that it is not sufficient for the wife to have been deserted by her husband to qualify her for benefits. There is the further requirement that she must have been “living apart” from him at the time of his death “by reason of his desertion.” In other words, the status of the wife is *not* permanently and irrevocably fixed by the act of her husband's desertion, regardless of what the wife may thereafter do. Query: then to what extent can a deserted wife vary her eligibility for dependency, and by what acts on her part?

THE SIGNIFICANCE OF “LIVING APART”—To begin our analysis, let us give consideration to the words “living apart” in Sec. 2(16) and their significance. This participial phrase has reference to something *the wife* does, and describes a mode of life to be followed by her. The statute, it will be observed, does not require merely an act by the husband in

the form of a continuing desertion. It also requires something of the wife; namely, that she be "living apart." Furthermore, it requires of her that she be living apart, not only at the time of the husband's death, but "for justifiable cause or by reason of his desertion at such time." The words of the statute make it plain, therefore, that action by the husband alone is not the criterion of the dependency claim; there must also be action by the wife at a given time and for specified reasons.

To the words "living apart" must be given the reasonably intended connotation. In using them, Congress seems to have intended to create a status of dependency in a deserted wife so long as she remains in a separated condition. The facts of the instant case show that the claimant was not "living apart" from her first husband at the time of his death either for justifiable cause or by reason of his desertion. In fact, she had ceased "living apart" from him in 1938, when she became Mrs. Kelly and ceased to be the abandoned Mrs. Campbell. Her status between 1938 and 1945, rather than being the negative one of "*living apart*" from the decedent, had become the affirmative one of *living with* Kelly as his wife. She no longer held herself out to the world as "living apart" from Campbell for any reason, whether for justifiable cause or by reason of his desertion. She abandoned that position when she adopted a new marital status.

Thus it becomes apparent that the claimant was no longer "living apart" from decedent at the time of his death, nor at any time after the second

marriage. It would be an absurdity to say that she was "living apart" from her first husband at the same time that she was admittedly living with her second husband. The two statuses are incompatible, one with the other. The new relationship was in derogation of the old, and became the *independent cause* of her not living with the decedent at the time of his death.

CLAIMANT'S REMARRIAGE BARS HER RIGHT TO COMPENSATION

It is the view of the federal courts that remarriage of a claimant living apart from her husband bars her right to collect a death benefit award under the Longshoremen's Act. This rule has been recently enunciated by the 5th Circuit Court of Appeals in the only case ever squarely to involve that point (which is the exact point involved in the instant case). *Ryan Stevedoring Company v. Henderson*, 138 Fed. 2d 348 (1943).

The facts in the *Ryan Stevedoring Company* case, supra, were that the employee, W. M. Sills, and Sarah Sills were married in 1926. In 1928 she separated from him for justifiable cause and some years later married William Johnson without obtaining a divorce from Sills. After 3½ years of this marital relationship with Johnson, she left him. When Sills suffered a fatal compensable injury about 1940, she sought to recover a death benefit under the Longshoremen's Act. The court said:

"The evidence clearly shows that the original separation was for justifiable cause and that such

justifiable cause continued for a long time after the separation. We think, however, that it cannot be said that at the time of W. M. Sills' death she was then living apart for justifiable cause, for there had intervened the bigamous marriage of Sarah Sills to William Johnson, and for three and one-half years she had lived with Johnson, holding herself out as his wife. The bigamous marriage brought to an end the period of separation for justifiable cause and Sarah Sills thereby forfeited any rights she had to recover benefits in the event of her lawful husband's death. Any other holding would do violence to the spirit and purpose of the Act. (Citations.)

"On the facts it cannot be held that the claimant was living apart from her husband at the time of his death for justifiable cause. The compensation order was not in accordance with law, and the District Court should have set it aside. The judgment is reversed and the cause is remanded for further proceedings in conformity herewith."

THE FACTOR OF MISCONDUCT ON THE CLAIMANT'S PART IS A FALSE QUANTITY IN THE CASE

Some courts have adopted the rule that misconduct of a deserted wife with another man will not deprive her of a right to a death benefit. *Travelers Ins. Co. v. Norton*, 34 F. Supp. 740; *Associated Operating Co. v. Lowe*, 52 F. Supp. 550. These two district court opinions have applied the rule to cases under the Longshoremen's Act. Opposed to this view is the late circuit court opinion in *Amer. Mut. Liab. Ins. Co. v. Henderson*, 141 F. 2d 813.

The two district court cases cited in the preceding paragraph go off on the theory of the possible effect of wrong-doing on the part of the deserted wife. We have no particular fault to find with the theory that mere misconduct of the separated wife produces no change in the legal status of the parties, nor with a rule that such deserted wife shall not be penalized for indulgence in amours during the desertion period.

But such a theory has no application to the facts of the instant case. The factor of wrongdoing is entirely a false quantity in the present situation. There is no evidence to indicate any wrongdoing on the part of this claimant, and the deputy commissioner specifically found that she acted in good faith in entering into her second marriage. We, therefore, see no relevancy to the present case in decisions, whether of the federal or other courts, which turn on the fact of misconduct or wrongdoing on the part of the abandoned wife.

The rule in the *Ryan* case, *supra*, is therefore not merely the only determination of this particular question by an American court, federal or state. It presents the only rational solution of the problem, and the only solution which avoids doing violence to a sense of logic and fair play, as well as to the spirit and purpose of the Act.

**A CHANGE IN MARITAL STATUS TERMINATES THE
PERIOD OF DESERTION OR SEPARATION FOR
JUSTIFIABLE CAUSE**

As demonstrated in the preceding discussion, we are not dealing with a case wherein the abandoned

wife is sought to be penalized for her moral derelictions. This is a situation where she has forsaken the status of abandoned wife and has in good faith embarked on a new marital career.

Without question, an abandoned wife can take steps to terminate her status as one deserted, for example by divorce, or by refusal of an offer to resume the marital status. We believe the steps taken by this claimant constituted a valid termination of her status as a *deserted* wife, whether or not it ended her primary status as legal wife of the decedent. We believe the same holds true as to the effect of such steps on termination of the status of "living apart" for reasons specified by the statute.

The marriage to Kelly was an overt act signalizing a new status—an act by which the claimant made known to the world *her* abandonment of the status of deserted wife. Even more clearly than by refusal to resume an offer by the decedent to resume marital relations, the claimant by her second marriage signified the termination of her relationship to decedent. Such a refusal to resume the original relationship would have been a matter of private conversation or correspondence between parties, but the second marriage to Kelly was by contrast a matter of public record and notice. The intentions of the claimant cannot be the subject of doubt under such conditions.

Furthermore, the claimant's second marriage was a *permanent* move on her part, not one lightly to be cast aside, as in case of a temporary alliance or

“without benefit of clergy” affair with some other man. In the latter type of cases, it can well be argued that the wife’s behavior during the desertion period effectuates no change in her relationship to the decedent, and indicates no intent to alter her position as a deserted wife. In the instant case, the claimant deliberately and formally changed her status and ceased living apart from decedent, not “by reason of his desertion” or “for justifiable cause,” *but because she thought he was dead and was told by her lawyer that it was proper to remarry.* With that remarriage she wrote finis to one chapter of her life and commenced another.

We submit that the distinction involved is decisive. The mere fact that a deserted wife may drift into an informal liaison with another man is not necessarily fatal to her right to an award. But the fact that she takes a *formal step* (by means of marriage vows) to enter a new relationship is notice to the world that she has ended the old relationship. Under such circumstances, as the court so aptly put it in the *Ryan* case, *supra*, “ * * * it cannot be held that the claimant was living apart from her husband at the time of his death for justifiable cause.” (Emphasis added.)

Nor can it avail the claimant anything to argue that she never lost her status as decedent’s wife because her second marriage was void. While the second marriage could not terminate her status as legal wife of the decedent, *it could and clearly did terminate her status as a deserted wife.* Also, it ended the period of “living apart” from husband No. 1.

INSUFFICIENCY OF DEPUTY COMMISSIONER'S FINDINGS

The deputy commissioner found that the acts and conduct of decedent Campbell constituted desertion of the claimant, that the claimant was still the wife of Campbell at the time of his death, and that Campbell was still deserting her at said time. In this connection, it is worthy of note and perhaps highly significant that the deputy commissioner contented himself with the foregoing findings. He did not assert, and could not have asserted on the basis of the record, that the claimant was "living apart" from Campbell at the time of his death "for justifiable cause or by reason of his desertion." As we have shown before, the phrase "living apart" did not after 1938 properly describe the status of Mrs. Kelly; and if it be deemed, nevertheless, that she was "living apart" from Campbell *after* she became Mrs. Kelly, it was *not* by reason of her desertion by Campbell, but because she acquired a new marital status as Mrs. Kelly.

Likewise, the deputy commissioner failed to make any finding with respect to termination of payments by reason of the second marriage. Sec. 9(b) of the Act provides that the payment to a surviving wife who remarries shall be "two years compensation in one sum upon remarriage." The decision of the deputy commissioner completely ignores this provision of the law. Despite the remarriage of the claimant, and the fact that she continues to this very date in her status as Mrs. Kelly, the award makes no provision for a lump sum two-year payment to

her. The attention of the court is directed to the fact that Sec. 9(b) of the Act provides that payments to a surviving wife shall continue only "during widowhood." It is thus apparent that Congress intended the right to benefits to end upon remarriage. In this case, remarriage was seven years before the death of the decedent, and the period of widowhood had ended before it began.

In the case of *Williams v. Lawson*, 35 F. 2d 346, the federal court aptly said: "A preceding section of the Act (referring to Section 2(16)) having defined the word 'widow' when used in the Act, it is to be inferred that an intended effect of making the prescribed compensation payable 'during widowhood' was to keep the right provided for from accruing in favor of one who was the wife of the deceased employee at the time of his death, *but whose state or condition at that time was not that of a widow as defined in Section 2 of the act.*" (Emphasis added.)

RECAPITULATION

In summary, we submit that—

(1) The facts are undisputed, but the case is properly reviewable because of an erroneous application of the law to such undisputed facts.

(2) The applicable sections of the Longshoremen's Act exclude dependency of this claimant unless it can be shown that she was "living apart" for justifiable cause or by reason of desertion by decedent at the time of his death.

(3) But claimant was not "living apart" for either of these reasons, but for a new and independent reason—her marriage to Kelly.

(4) The only case "on all fours" holds the right to benefits barred in such a situation.

(5) Cases which hold that misconduct of a deserted wife is not fatal to her claim for a death benefit have no application to the problem in this case, as they deal with a different factual situation.

(6) A change in marital status, such as occurred in this case, may not terminate the status of the claimant as decedent's legal wife, but it effectually terminates her status as a wife deserted.

(7) An analysis of the statute shows clearly that a termination of the status of living apart by reason of the husband's desertion is sufficient to disqualify the claimant as one entitled to benefits.

(8) Thus, statutory analysis unites with precedent to demand a rational solution of this problem and one which will not "do violence to the spirit and purpose of the Act."

Wherefore, it is respectfully urged that appellants' be granted the relief asked in their complaint for injunction.

Respectfully submitted,

.....
Attorneys for Appellants.

Federal Security Agency
Bureau of Employees Compensation
13th Compensation District

Case No. 8-1620

Claim 2539

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

LUELLA G. CAMPBELL, also known as
LUELLA G. KELLY, Widow of
WILLIAM ANGUS CAMPBELL, Deceased,
Claimant.

against

MOORE DRY DOCK COMPANY,
Employer,

FIREMAN'S FUND INDEMNITY COMPANY,
Insurance Carrier.

**COMPENSATION OF ORDER
AWARD OF DEATH BENEFIT**

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 12th day of May 1945 William Campbell, husband of the claimant herein, was in the employ of the employer above named at Oakland, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Indemnity Company;

That on said day the said employee while performing service for the employer as a stage rigger and engaged in ship repair operations on a completed vessel on navigable waters of the United States at said harbor, sustained personal injury occurring in the course of and arising out of his employment, and resulting in immediate death as follows: He fell from the vessel into the water and was drowned;

That the average annual earnings of the employee herein at the time of his injury are not determined, and a determination thereof is deferred until later necessity arises, that the average weekly wage is admitted to exceed \$37.50;

That the claimant herein, Luella G. Campbell also known as Luella G. Kelly, was born December 26th, 1903, and was married to the employee, William Angus Campbell, on February 8th, 1922. The said employee left claimant on or about September 4th, 1923. During the following period of five

months he wrote her on several occasions and thereafter did not communicate with her to the time of his death. He did not after his departure contribute to her support or to the support of their two children; that such conduct constituted desertion of claimant by the said William Angus Campbell. In good faith and believing her husband, William Angus Campbell, to be dead, claimant married one William James Kelly on May 14th, 1933. At said time the said William Angus Campbell was still living. No divorce was ever had between claimant and William Angus Campbell, that therefore claimant was still the wife of William Angus Campbell at the time of his death on May 12th, 1945, and that the said William Angus Campbell was still deserting her at said time. That claimant is entitled to a death benefit at the rate of \$13.13 a week commencing with May 13th, 1945, and payable at said rate in installments each two weeks or monthly at her election until further order of the Deputy Commissioner. That the children of the said William Angus Campbell had reached the age of 18 years prior to the time of his death.

The claimant's attorney, Mr. Victor B. Harrison, has rendered service to claimant in the prosecution of her claim of the reasonable value of \$150.00, and is entitled to a lien therefor upon compensation herein awarded.

Upon the foregoing facts, the Deputy Commissioner makes the following:

AWARD

That the employer, Moore Dry Dock Company, and its insurance carrier, Fireman's Fund Indemnity Company, shall pay to the claimant compensation as follows:

To claimant, Luella G. Campbell, also known as Luella G. Kelly, the sum of \$13.13 a week payable in installments each two weeks or monthly at her election beginning with May 13, 1945, until the further order of the Deputy Commissioner, less however the sum of \$150.00 to be deducted from said payments and paid by defendants to said Victor B. Harrison upon his lien for attorney's fees.

Given under my hand at San Francisco, California, this 3rd day of December, 1946.

WARREN H. PILLSBURY,
Deputy Commissioner,
13th Compensation District.

WHP:a:mac